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Supreme Court, U.S.
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No. 97-1868

In the
Supreme Court of the United States

OCTOBER TERM, 1998

UNUM LIFE INSURANCE CO. OF AMERICA,
Petitioner

v.

JOHN E. WARD,
Respondent

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Pursuant to S.Ct. Rule 25.5, respondent John Ward submits a supplemental brief addressing this Court's decision in *Humana, Inc. v. Forsyth*, No. 97-303, decided after Ward filed his brief. The *Forsyth* decision is relevant because it implicitly rejects several of the arguments on which petitioner relies in contending that the California notice-prejudice rule is not a state law that regulates insurance.

I. The Decision in *Humana, Inc. v. Forsyth*

The McCarran-Ferguson Act provides that, unless a federal statute specifically relates to the business of insurance, it cannot be applied to "invalidate, impair, or supercede any law enacted by any state for the purpose of regulating the business of insurance." 15 U.S.C. §1012(b). *Forsyth* held that the application of the RICO Act, 18 U.S.C. §1961 *et seq.*, in a lawsuit by policy beneficiaries who alleged they had been defrauded by an insurer, did not "impair" Nevada's laws proscribing fraudulent practices by insurers, and was therefore not barred by the McCarran-Ferguson Act.

The *Forsyth* decision makes clear that the Nevada laws in question included "both statutory and common-law remedies to check insurance fraud." Slip op. at 10. *See also id.* at 13 (same). The Court noted that Nevada's Unfair Insurance Practices Act, Nev. Rev. Stat. §686A.010 (1996), prohibits various forms of insurance fraud, including misrepresentation and false advertising, publication of false information, falsification of records, and fraudulent claims. Slip op. at 10-11 & n. 9. The Nevada Act provides both administrative remedies and private causes of action. Slip op. at 11. The Court also noted that Nevada permits victims of insurance fraud and bad faith to pursue common law causes of action arising out of the insurer's tortious breach of the covenant of good faith and fair dealing. Slip op. at 11.

II. Forsyth Demonstrates That A State Law May Regulate Insurance Even If It Does Not Satisfy All Three McCarran-Ferguson Act Factors.

A predicate for the application of the McCarran-Ferguson Act in *Forsyth* was the presence of a state law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. §1012(b). In *Forsyth* neither party contested that Nevada's laws proscribing and punishing fraudulent practices by insurers met this definition.[1]

In this case, UNUM argues that unless a state law satisfies all three of the so-called McCarran-Ferguson factors, it cannot qualify under ERISA as a state law that regulates insurance. Pet. Br. at 23-26; Pet. Reply Br. at 5-7. These factors were developed by the Court to assist it in determining whether a particular *practice* engaged in by an insurance company constituted the "business of insurance" and was therefore made immune from antitrust regulation by the McCarran-Ferguson Act. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).[2]

If UNUM's argument were correct, and these three factors also constituted a rigid, mandatory test for whether a state

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[1] In response to a question from Justice Kennedy during oral argument, counsel for the respondent confirmed that there was no dispute that the Nevada laws were adopted for the purpose of regulating the business of insurance.

[2] *Pireno* listed the factors as: "[F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." 458 U.S. at 129.

law *regulates* the business of insurance, then the Nevada laws at issue in *Forsyth* would necessarily have to meet all three criteria. If they did not, the McCarran-Ferguson Act would not apply.

It is clear, however, that laws preventing an insurance company from engaging in the type of misconduct at issue in *Forsyth* do not meet two of the three McCarran-Ferguson factors. As UNUM itself has conceded, laws that prohibit insurers from making false statements or engaging in unfair claims practices do not spread risk (the first factor).[3] Nor are state prohibitions on false statements or deceptive trade practices limited exclusively to entities within the insurance industry (the third factor).

Yet it is beyond dispute that Nevada's laws prohibiting insurance fraud are rules that were enacted to regulate the business of insurance. Those laws plainly regulate the relationship between the insurer and the insured by protecting insurance purchasers from deception and overreaching by insurance companies. As we previously argued, Resp. Br. at 13, 28, laws regulating this relationship, including laws against deceptive insurance practices, regulate what this Court has described as "the core" of the business of insurance.

The three McCarran-Ferguson Act factors were formulated to answer a specific question: Does a particular "practice" fall within the business of insurance? UNUM's argument substitutes the word "law" for the word "practice." As a result, the question UNUM poses is whether a particular law falls within "the business of insurance." The proper question, however, is whether the law *regulates* insurance. *Forsyth* shows that rigid application of these factors in the manner UNUM

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[3] UNUM acknowledges, Pet. Reply Br. at 6, that rules addressing the truth or falsity of statements made by the parties to insurance contracts do not involve the spreading of risk.

proposes does not consistently yield the right answer to that question even within the context of the McCarran-Ferguson Act itself, let alone within the context of ERISA, which is the statute at issue in this case.

III. *Forsyth* Shows That State Laws Derived From Common Law Doctrines Can Be Deemed To Regulate Insurance.

UNUM reads this Court's decision in *Pilot Life Ins.Co. v. Dedeaux*, 481 U.S. 41, 50 (1987), as holding that, in order to regulate insurance, a state law must not only (a) be directed at the insurance industry, but (b) must not resemble other state laws regulating other types of contracts or commerce and, indeed, (c) may not even be based on common law principles that have been found applicable outside the insurance realm. Pet. Br. 27-30; Pet. Reply Br. at 1-5.

Forsyth exposes the flaw in UNUM's position. The Nevada laws at issue in *Forsyth* were not based on some unique or esoteric principle of insurance regulation not applicable elsewhere in the law. Rather, both the statutory enactments and the common law remedies reviewed by this Court were based on, and included, common law rules concerning fraud, misrepresentation, false advertising, the duty to negotiate and deal in good faith, and other principles familiar in state laws regulating many areas of commerce. Slip op. at 11-13.

Forsyth thus illustrates that a state may look to generally applicable legal principles when forging the legal tools it will employ to regulate insurance, and that the available raw materials include rules developed and tested under the common law to regulate other forms of contract and commerce. When a state makes the policy choice to adopt a particular rule to regulate insurance, the fact that similar rules, or their animating

principles, are also found elsewhere in the law does not mean that the state's chosen rule is any less a regulation of insurance.

Forsyth also disproves UNUM's remarkable contention that the common law "is not readily amenable to being regarded as a regulatory law." Reply Br. at 4. The Court made no effort to distinguish Nevada's common-law rules from the rest of its framework of insurance regulation. Instead, the Court expressly included Nevada's "common-law remedies" for misconduct by insurance companies as part of the "'State's administrative regime'" of "'state regulation'" designed to "check insurance fraud." Slip op. at 10. Indeed, the Court went out of its way in *Forsyth* to note that the lower courts erred by "inaccurately projecting" Nevada's insurance laws "as allowing for administrative remedies only." Slip op. at 3-4 n. 5. To the contrary, the Court stressed that the Nevada Unfair Insurance Practices Act was "not hermetically sealed; it does not exclude application of other state laws, statutory or decisional." Slip op. at 11. All such laws were, to this Court's mind, equally legitimate parts of the state's regulatory regime.

Surely this is no surprise. The common law regulated the conduct of businesses and individuals for centuries before the first "regulatory" code was adopted or the first administrative agency was created. This approach to common law as often regulatory in nature is entirely consistent with this Court's long-standing recognition that the obligation to pay compensation under state common law is designed to be a potent method for governing conduct and controlling policy.

Respectfully submitted,

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